FILE COPY

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 235

GREAT NORTHERN LIFE INSURANCE COMPANY,
Petitioner,

vs.

JESS G. READ, Insurance Commissioner for the State of Oklahoma,
Respondent.

BRIEF IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI

MAC Q. WILLIAMSON,
Attorney General of Oklahoma;

FRED HANSEN,
Assistant Attorney General of Oklahoma;

ANDY CROSBY, JR.,
State Capital Building,
Oklahoma City, Oklahoma,
Attorneys for Respondent.

September, 1943.

KING LAW BRIEF CO., Inc., 418 N.W. Third, Oklahoma City—Phone 3-2969

INDEX

The action involved here is, in reality, a suit against the State of Oklahoma by a citizen of another state, and hence brought in violation of the 11th Amendment of the Constitution of the United States for the reason that said state has not consented to be sued for the

In the
Supreme Court of the United States
OCTOBER TERM, 1943

No. 235

GREAT NORTHERN LIFE INSURANCE COMPANY,
Petitioner,

vs.

JESS G. READ, Insurance Commissioner for the State of Oklahoma,
Respondent.

BRIEF IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI

SUMMARY STATEMENT OF MATTERS INVOLVED

The statement which appears on pages 1 to 6 of the petition herein is substantially correct. However, since the reference therein to respondent's answer (R. 12), in so far as said answer refers to petitioner's original entrance in Oklahoma in 1922, is susceptible of being construed as an admis-

sion by respondent that the Great Northern Life Insurance Company was—

(a) then licensed and authorized to do business in Oklahoma for a longer period than the license year ending February 28, 1943, and

(b) then a citizen in Oklahoma for a longer period than said license year,

respondent desired to specifically call attention to the sixth paragraph of said answer (R. 12-13), which clearly shows to the contrary.

Moreover, the first paragraph of said statement (P. 1), which recites that:

> "This case challenges the validity under the equal protection clause of the Fourteenth Amendment to the Federal Constitution of the Oklahoma gross premiums tax law of 1941, *and is the first test of the validity of this law,*"

is not correct *since prior to the filing of said case* in the United States District Court for the Western District of Oklahoma on March 28, 1942 (R. 11), an essentially identical case was filed by the Lincoln National Life Insurance Company against this respondent in cause No. 105,488, in the District Court of Oklahoma County, Oklahoma, which also challenged the validity, under the equal protection clause of the Fourteenth Amendment, of the Oklahoma gross premiums tax law of 1941.

The validity of said act was upheld by the state district court on September 8, 1942, while the validity thereof was not upheld by the Federal District Court until October 14, 1942. An appeal was taken on March 8, 1943, by the Lincoln

National Life Insurance Company from the decision of the state district court to the Supreme Court of Oklahoma (briefs have been filed by both parties), while the instant petition for a writ of certiorari and supporting brief was not filed in this Court until August 6, 1943.

Said appeal in the Oklahoma Supreme Court involves, as does this case, (a) the construction and meaning of the constitutional and statutory provisions of the State of Oklahoma providing for an annual tax of two per cent, now four per cent, on the Oklahoma premiums of foreign companies doing business in Oklahoma, and (b) whether or not said provisions as so construed violate the equal protection clause of the Fourteenth Amendment of the Constitution of the United States.

STATEMENT OF BASIS OF JURISDICTION

The statement above mentioned is set forth on page 6 of the petition for writ of certiorari herein, as follows:

> "It is believed that the jurisdiction of this court to review the judgment in question is sustained by:
>
> "Section 240 of the Judicial Code as amended (Title 28, Sec. 347, Subd. [a], U. S. C. A.)
>
> "Rule 38, Section 5, Sub-sec. (b), Rules of the Supreme Court as amended."

It will be noted that the above statement does not contain, as required by Section 2 of said Rule 38,

> "a statement *particularly disclosing* the basis upon which it is contended that this court has jurisdiction to review the judgment or decree in question; * * *."

It will also be noted that Sub-section (b), Section 5 of said Rule 38, referred to by petitioner, recites five distinct bases (not exclusive) under which this Court, in its discretion, has jurisdiction to review the judgment or decree of a United States Circuit Court of Appeals upon a petition for a writ of certiorari, same being set forth therein as follows:

> "Where a circuit court of appeals has rendered a decision in conflict with the decision of another circuit court of appeals on the same matter;
>
> "*or* has decided an important question of local law in a way probably in conflict with applicable local decisions;
>
> "*or* has decided an important question of federal law which has not been, but should be, settled by this court;
>
> "*or* has decided a federal question in a way probably in conflict with applicable decisions of this court;
>
> "*or* has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision."

By reason of the failure of petitioner to *particularly disclose* in its said quoted statement which of the above bases it contends this Court has jurisdiction to review the judgment and decree involved here, neither respondent nor this Court is able to determine from said statement the basis upon which petitioner relies.

QUESTION PRESENTED

By an examination of the question above referred to, which is set forth in the petition for writ of certiorari herein (P. 67), as follows:

"Correctness of the Circuit Court's decision that Oklahoma had power, despite the equal protection clause, to levy a heavily discriminatory tax on a foreign insurance company's 1941 business during the year 1941, after the company's due admission to the state in compliance with laws then in force, and at a time when the foreign company stood on an equal plane with domestic companies, under Oklahoma law, *and pending the business year already authorized,*"

which question is in substance set forth as the "Assignment of Error" on page 15 of said petition, it will be found that the question presented to this Court by petitioner *is apparently limited* to the legality of the payment of a foreign insurance company licensed to do business in Oklahoma for the license year beginning March 1, 1941, and ending February 28, 1942, of a four per cent tax, *rather than a two per cent tax,* on the amount of premiums, less proper deductions, it collected in Oklahoma during the calendar year 1941.

If petitioner intended to so limit said question, same is necessarily based on the proposition that since the 1941 Act (P. 10-12), raising the annual premium tax from two to four per cent, did not go into effect until April 25, 1941, to-wit: until after the beginning of the license year ending February 28, 1942, the Insurance Commissioner of Oklahoma erred in applying said four per cent tax to said license year.

If it was the intention of petitioner to so limit said question it would not appear that this Court should issue the writ of certiorari prayed for, since a decision as to said question—

(a) would only govern in the instant case, as petitioner and the Lincoln National Life Insurance Company, heretofore referred to (whose appeal is now pending in the Supreme Court of Oklahoma), are the only companies who have challenged the application of said four per cent tax, rather than said two per cent tax, to said license year, and

(b) would not apply to premium taxes collected for the privilege of entering Oklahoma and doing business therein for subsequent license years.

However, in relation to the merits of said limited question, attention is called to our analysis of the case of *Pacific Mutual Life Insurance Company* v. *Hobbs, Commissioner of Insurance* (Kan. 1940), 103 Pac. (2d) 854, set forth in the subhead "Annual Privilege Taxes May Be Paid Either Before or After Exercise of Privilege" of this brief.

ARGUMENT

Inasmuch as the "Argument" set forth on pages 16 to 28 of the petition for writ of certiorari herein is not addressed to the limited question apparently presented by petitioner, as aforesaid, respondent will address his argument herein to the basic proposition actually involved in the instant case, same being as follows:

"THE ANNUAL TAX OF TWO PER CENTUM (SINCE APRIL 25,1941—FOUR PER CENTUM) COLLECTED ON THE OKLAHOMA PREMIUMS OF FOREIGN INSURANCE COMPANIES IS NOT AND NEVER HAS BEEN INVALID UNDER THE PROVISIONS OF THE 14TH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES BY REASON OF THE FACT THAT A LIKE TAX IS

NOT COLLECTED ON THE OKLAHOMA PREMIUMS OF COMPETING DOMESTIC INSURANCE COMPANIES."

In connection with the above proposition respondent calls attention to the "Stipulation of Facts" in this case (R. 22-27), which, omitting its caption and signatures, is quoted herein, for the convenience of the Court, as follows:

"It is stipulated and agreed by and between the parties hereto as follows:

"(1) That the sum of $8,189.32, paid by plaintiff to defendant under protest, has been held by defendant separate and apart from the General Revenue Fund of the State Treasury of Oklahoma, as provided by Section 12665, O. S. 1931, and that said sum will not be deposited in said fund unless and until there is a final adjudication in favor of defendant and against plaintiff, but if plaintiff obtains a final adjudication in its favor, the amount found by the court to be due plaintiff will be paid to it, as provided in said section.

"(2) That domestic life, health and accident insurance companies competing in Oklahoma with plaintiff do not pay any kind or type of taxes to said state which are not likewise paid by plaintiff, except that said competnig domestic insurance companies pay an annual income tax, from which tax plaintiff is exempt, the amount of which tax, however, is approximately only 1/20th of the amount the four per cent tax would bring on the premiums collected by said companies in this state, less proper deductions.

"(3) That during the period beginning November 16, 1907, and ending December 31, 1941, the total receipts of the Oklahoma Insurance Department from the two per cent tax on gross premiums of foreign insurance companies, and from the annual entrance and agents' fees of such companies, aggregate $25,585,107.34, while the expenses of said department during said period aggre-

gate $910,107.34, said expenses being approximately 3.55 per cent of said total receipts, and that since December 31, 1941, said expenses are approximately only 2 per cent of the gross receipts thereof.

"(4) That under the *uniform administrative practice* of the State Insurance Commissioner since the effective date of the 1909 General Insurance Act of Oklahoma, when a foreign insurance company desires for the first time to do business in Oklahoma, *it is required*, among other things, to file an application for a license therefor, same to expire the succeeding last day of February (see true and correct copy of such an application attached hereto as 'Exhibit A'), and on or before said date, *to pay* a tax of two per centum (since April 25, 1941—four per centum) on all premiums, less proper deductions, which it receives in Oklahoma after it is so licensed and prior to the succeeding first day of January; and that under the *uniform administrative interpretation* by said Commissioner of the insurance laws of Oklahoma since said effective date, he has considered and treated said tax as being paid for the right or privilege of entering Oklahoma and doing business therein to and including said last day of February, and a license issued by him to said company (see true and correct copy of such a license attached hereto as Exhibit 'B') as expiring by operation of law and its express terms on said date. It is understood that plaintiff does not agree to the correctness of the above administrative interpretation.

"(5) That under the *uniform administrative practice* of the State Insurance Commissioner since the effective date of the 1909 General Insurance Act of Oklahoma, when a foreign insurance company holding a license to do business in Oklahoma during any license year (same being from March 1 to and including the succeeding last day of February), desires to do business therein during the ensuing license year, *it is required*, among other things:

"(a) to file, on or before the last day of February of the current license year, an application for a

license therefor (see true and correct copy of such an application attached hereto as 'Exhibit A'),

"(b) as a condition precedent, *to have paid* a tax of two per centum (since April 25, 1941—four per centum), on all premiums, less proper deductions, which is received in Oklahoma during the preceding calendar year, and

"(c) on or before the last day of February of said succeeding license year, *to pay* a similar tax on all premiums, less proper deductions, which it received in Oklahoma during the preceding calendar year;

"and that under the *uniform administrative interpretation* of said Commissioner of the insurance laws of Oklahoma since said effective date, he has considered and treated the tax first above mentioned as having been paid for the right or privilege of having been permitted to enter Oklahoma and do business therein during the then current license year, the tax last above mentioned as being paid for the right or privilege of having been permitted to enter Oklahoma and to business therein during said ensuing license year, and a license issued by him to said company (see true and correct copy of such a license attached hereto as 'Exhibit B'), as expiring by operation of law and its express terms at the end of said license year. It is understood that plaintiff does not agree to the correctness of the above administrative interpretation.

"(6) That under the *uniform administrative practice* of the State Insurance Commissioner since April 25, 1941, the effective date of Chapter 1a, Title 36, page 121, Oklahoma Session Laws 1941, the annual four per cent tax on premiums, referred to in said section, has been levied and collected on all premiums received by licensed foreign insurance companies in this state, less proper deductions, 'within the twelve months next preceding the first day of January, 1942,' as well as on all premiums, less proper deductions, received by said companies in this state after said date. It is understood that plaintiff does not

agree to the correctness of the above administrative practice."

Pertinent Conclusions of Law of the Trial Court

In relation to the 4th and 5th paragraphs of the stipulation herein (R. 23-24), above quoted, respondent desires to call attention to the 6th, 7th and 8th paragraphs of the "Conclusions of Law" of the trial court (R. 32-33), which are based on said paragraphs of said stipulation. Said conclusions of law are in harmony with respondent's position here, and we respectfully ask the Court to carefully consider the same.

The Lincoln Life Insurance Company Case

Inasmuch as the District Court of Oklahoma County on September 8, 1942, handed down a decision (R. 39-43) in the above case, as aforesaid, the first cause of action of which it is stipulated (R. 38) "involved issues substantially the same" as those involved in petitioner's complaint, in which decision said court construed the meaning of the constitutional and statutory provisions of Oklahoma involved in this case in relation to issues identical to those involved here, and since neither of the appellate courts of Oklahoma have directly construed said provisions in relation to said issues, respondent respectfully asks this Court to carefully consider said decision and especially paragraphs (a) and (b) thereof (R. 40-42).

While it is true that the above decision (same being the only applicable Oklahoma district court decision) is not that of an appellate court of this State (although such district courts exercise certain final as well as intermediate appellate powers), it is a decision of a constitutional trial court having "general jurisdiction (*Samuels* v. *Granite Savings Bank & Trust Company*, 150 Okla. 174, 1 Pac. [2d] 145), which is "endowed with the dual power of a court of equity and a court of law" (*Wentz* v. *Thomas*, 150 Okla. 124, 15 Pac. [2d] 65), and hence has judicial powers essentially the same as those exercised by vice-chancellors of the Court of Chancery of the State of New Jersey. In this connection it will be noted that in the recent case of *Fidelity Union Trust Company et al.* v. *Field*, 311 U. S. 169, 85 L. ed. 109, decided January 6, 1941, it was held that decisions of vice-chancellors of the Court of Chancery of the State of New Jersey, construing a statute of that state, were binding not only on a United States District Court sitting in said state as to the meaning of said statute, but upon the United States Circuit Court of Appeals, on appeal.

Annual Privilege Taxes May Be Paid Either Before or After Exercise of Privilege

The fact that the annual privilege taxes involved here are paid after rather than before the exercise by a foreign insurance company of the privilege of entering Oklahoma and doing business therein during any license year, is immaterial. *This is especially true in Oklahoma since proof of*

the payment of said privilege taxes by a foreign insurance company is a condition precedent to the issuance of a license thereto for the ensuing license year.

In this connection, attention is called to the case of *Carpenter, Insurance Commissioner*, v. *Peoples Mutual Insurance Co.* (Cal. 1937), 74 Pac. (2d) 508, wherein the second paragraph of the syllabus is as follows:

> "*The payment of a privilege tax may precede exercise of privilege or follow it*, the choice of method being within legislative discretion, and where tax is proportionate to amount of business alone, *it is equitable that it be paid after conclusion of year in which privilege is exercised.*"

Attention is also called to the recent case of *Pacific Mutual Life Insurance Company* v. *Hobbs, Commissioner of Insurance* (Kan. 1940), 103 Pac. (2d) 854, wherein the syllabus is as follows:

> "1. Our statute, G. S. 1935, 40-252, requiring foreign insurance companies at the time of making annual statements required by law, to pay taxes on the gross amount of premiums received by them for business done in the state during the preceding year, *imposes such taxes, payable at the end of the year, for the privilege of doing business in the state.*
>
> "2. The tax on gross premiums received by foreign insurance companies for business done in the state is an excise tax in the nature of a franchise or privilege tax on the privilege of doing business, *and partakes of a license tax in the sense that payment thereof is required as a condition precedent to the renewal of such companies' certificates of authority.*"

By an examination of the body of the opinion in the above case it will be noted that the plaintiff company therein

unsuccessfully asked for a writ of mandamus requiring the Insurance Commissioner of Kansas to refund certain premium taxes paid by it under protest in January, 1937, under the theory:

(a). that the laws of said State required such taxes, although computed on premiums collected during the preceding year, to be paid for the privilege of doing business in Kansas during the ensuing year, and

(b). that since the company whose business it had taken over under an assumption agreement in July, 1936, had paid in January of said year, a tax for the privilege of doing business in Kansas during the year 1936, the plaintiff company could not be required to pay a tax on premiums collected by said company prior to July, 1936.

In refuting said theory the Kansas court held:

"The tax is on the privilege of doing business in state,—the tax is fixed at a percentage of premiums received during the preceding year. The payment of the tax follows the exercise of the privilege. The method selected appears to be both equitable and convenient.

"Upon the theory advanced by the plaintiff a foreign company coming into the state would be exempt from taxation upon the business done in the first year, if it withdrew at the end of the first year. It is not to be presumed the legislature intended to exempt a foreign insurance company from taxation upon its first year's business.

"In support of the suggestion that the tax is prospective privilege tax; counsel rely on *McNall* v. *Insurance Co., supra.* That case arose shortly after the original premium-tax statute was enacted. The insurance company had been doing business in the state before the law was passed. The vital question before the court was formulated in the first paragraph of the opinion which reads (65 Kan. 694, 70 Pac. 605): 'It is insisted by coun-

sel for defendant in error that the law set forth in the statement was given retroactive effect by the collection, under its authority, of taxes from the insurance company for the year 1899, based on business done in 1898, and that in fact the tax was on insurance written before the law was passed. With this contention we do not agree.'

"The argument of counsel, adverted to by the court, was that if the tax was collected it would be a tax on insurance written before the law was passed. The question whether the law was prospective or retroactive in its operation was germane to the issue before the court. In the present case we are not confronted with any question as to the retrospective operation of our statute. That decision was based on an unusual state of facts and the doctrine there announced is not to be extended."

It will thus be noted that the Kansas court, while holding in the case there under consideration that the premium tax of that state was collected at the end of the license year for the privilege of doing business in Kansas during said year, also held in said cited case that since said tax was required to be paid as a condition precedent to securing a license to do business in Kansas during the ensuing license year, a company seeking a license shortly after said law went into effect had to pay said tax on all of the premiums it had collected during the prior year, even though part thereof were collected before said law went into effect. It further held that this fact did not make said law retroactive.

The fact that petitioner first entered Oklahoma after the annual two per cent premium tax law was enacted but before the 1941 annual four per cent premium tax law went into effect, is immaterial.

The fact that said annual privilege tax was raised from two to four per cent after the petitioner insurance company was first licensed or permitted to do business in Oklahoma in 1922, for the license year ending February 28, 1923, is immaterial. In this connection attention is called to the case of *Northwestern National Insurance Company of Milwaukee* v. *Lee* (C. D Or., 1931), 49 Fed. (2d) 274, wherein the third paragraph of the syllabus is as follows:

> "Foreign corporation, permitted to enter state and engage in business, has right to invoke equal protection clause, *whether unjust discrimination arise under prior or subsequent legislation.*"

The above case clearly holds that for a discriminatory tax levied by a state against a foreign corporation to be valid, *it must be levied for the right or privilege of doing business in the State and not for the right or privilege of performing some desired act after it acquired the right to do business therein.* Said case further holds that if a discriminatory tax is levied against a foreign corporation, not for the right or privilege of doing business in the State, but for the right or privilege of performing some desired act after it had acquired the right to do business therein, the tax is invalid *regardless as to whether or not the law levying the same was enacted before or after the corporation acquired*

the right to do business in said State. Therefore, if the annual privilege tax involved here was not levied for the right or privilege of doing business in the State, it was invalid as to the petitioner insurance company even before it was increased from two to four per cent in 1941.

Gross Premium Tax Laws of Other States

On pages 7 and 8 of the petition for writ of certiorari herein it is asserted that:

> "The precedent established by the circuit court's opinion is of the utmost importance to many Oklahoma insurance policy holders *and in the interest of the public should be reviewed before the legislatures of various other states seek to adopt similar discriminatory laws.*"

Petitioner in making the above assertion fails to note that, as will hereinafter be shown, the laws of at least 29 of the 48 states already require the payment of *designated percentage taxes on premiums collected therein by foreign insurance companies,* although no like tax, nor a compensating or equalizing tax, is required to be paid by competing domestic insurance companies. However, respondent has been unable to find a single *case holding any of said laws invalid under either the Fourteenth Amendment of the Constitution of the United States or any other constitutional provision,* and petitioner has cited none. Said laws have been in force in many instances far longer than the Oklahoma law involved here, and apparently have been considered con-

stitutional and valid by all foreign insurance companies adversely affected thereby.

In practically all of such statutes other annual fees, *similar to the annual "entrance fees" referred to in the second paragraph of Section 2, Article 19 of our State Constitution,* are collected from said foreign insurance companies, but such collections have apparently not been treated by the courts as preventing said designated percentage taxes on premiums, although discriminatory, from being considered valid.

Moreover, if the annual "entrance fees" mentioned in said second paragraph are the sole fees or taxes paid by foreign insurance companies for the right or privilege of entering Oklahoma and doing business therein, as contended by petitioner, it is clear, inasmuch as said fees are required to be paid at the beginning of each license year, that when such a company first (or subsequently) enters Oklahoma to do business therein, it does so for only one license year, and not, as also contended by plaintiff, indefinitely.

In support of the statement above set forth as to the laws of other states, respondent respectfully calls attention to the booklet "Taxation Manual (1942-1943)," published by "The National Board of Underwriters," which reveals that in at least 29 of the 48 states foreign insurance companies are required to pay designated annual percentage taxes on premiums therein (as well as other annual fixed fees), although like or compensating or equalizing taxes are not collected from competing domestic insurance companies.

In this connection said booklet shows that in the states listed below (the booklet is not clear as to certain states, hence same are not listed here) discriminatory percentage taxes on premiums are collected as follows:

State	Percentage tax on premiums of foreign insurance companies.	Percentage tax on premiums of domestice insurance companies
Ala.	2½% Life; 1½% Fire	1%, less tax reduc. inv.
Ariz.	2%	0
	2% Life, A & H; 2% Suret/ and Bond	0
Colo.	2%. No tax if over 50% of assets inv. in Colo. Bonds, etc.	Money on deposit, etc., reduce tax to 0%.
Conn.	Reciprocal, except Co's of other Co's pay 2%.	0
Fla.	3% on W. C.; 2% on other ins.	0
Ill.	2%	0
Ind.	3%, less losses.	0
Iowa	2½%	0
Kan.	2%	0
Ky.	2%	2% on W. C. only
Me.	2%	0
Mass.	2%, except ¼ of 1% on net value of Life Ins.	¼ of 1% on net value of Life Insurance.
Mich.	3% on Fire, Marine and Auto; 2% Cas. and Life	0
Miss.	3%, except 2¼% on Life, H. & A. (Less tax inv.)	Diff. between ad val. tax and 50% foreign Co. tax
Neb.	2%	0
N. H.	2%	0
N. J.	2%	0
N. M.	2%	0
N. Dak.	2½%	0
Ohio	2½%	.002% on Cap. & Sur. Opt. 8 1/3 times Ohio prem.
Okla.	4%, except on fraternals	0
Ore.	2¼%	0
Pa.	2%	0
S. C.	5½% on W. C.; 1% on other insurance.	.008%
S. Dak.	2½%	1%
Tenn.	2½%	0
Wash.	2¼%	1%
W. Va.	2%	0

The above list was set forth in respondent's brief in both the trial court and Circuit Court of Appeals, and its correctness was not questioned in petitioner's briefs or oral

arguments or in its petition for rehearing in the Circuit Court.

The Philadelphia Fire Association Case

In determining the meaning and validity of the constitutional and statutory provisions of this state, heretofore quoted, especially those that impose an annual two per cent tax on the Oklahoma premiums of foreign insurance companies, but not on the like premiums of competing domestic insurance companies, the intention of the Oklahoma Constitutional Convention and Legislature in respectively adopting and enacting the same should be ascertained.

In this connection it must be presumed that said Convention and Legislature in adopting and enacting said provisions in 1907 and 1909 were cognizant of the fact that this Court had theretofore held in the case of *Philadelphia Fire Association* v. *New York* (1886), 119 U. S. 100, 30 L. ed. 342, that a state law imposing an annual tax on the premiums collected in said state of a foreign insurance company, but not on the like premiums of a competing domestic insurance company, did not violate the Fourteenth Amendment of the Constitution of the United States *if said tax was imposed for the privilege of entering the state and doing business therein during the succeeding license year.*

Inasmuch as said case was (and still is) the only decision of this Court on said question, it must be presumed that the principles of law announced therein were followed

in the adoption and enactment of the constitutional and statutory provisions involved here. In fact, it is inconceivable that the Oklahoma Constitutional Convention and 1909 Legislature intended to impose said annual two per cent premium tax in such a way as to make same unconstitutional, when a way had been pointed out in said decision to make said tax constitutional.

The Philadelphia Fire Association case was cited with approval in *Home Indemnity Company of New York* v. *O'Brien* (C. C. A. Mich., 1939), 104 Fed. (2d) 413, apparently as authority for the proposition that a state has the power, by the passage of retaliatory legislation,

> "to protect its own domestic insurance companies doing business in other states from burdens, prohibitions and limitations placed upon them by taxes, license fees, deposits and similar measures."

In this connection it will be noted that if state laws providing for the payment by foreign insurance companies of annual discriminatory privilege taxes are illegal, as contended by petitioner, it would be wholly unnecessary for other states to enact retaliatory legislation in effect providing that insurance companies domiciled in states having such discriminatory laws and desiring to do business in said "other states," must, in order to do business therein, pay similar privilege taxes in said "other states."

The New York Life Insurance Company Case

The pertinent Oklahoma constitutional provisions, as well as Section 10478, O. S. 1931 (Section 6687, C. O. S. 1921),

supra, were construed in the case of *New York Life Insurance Company* v. *Board of Commissioners of Oklahoma County* (Okla. 1932), 155 Okla. 247, 9 Pac. (2d) 936, referred to as inapplicable on page 19 of the petition for writ of certiorari herein. In said case it was held that the annual two per cent tax on the Oklahoma premiums of the New York Life Insurance Company was a valid "license fee, or privilege tax" charged said company "for the right or privilege to do business" in Oklahoma.

In this connection respondent, for the information of the Court, quotes certain material parts of said decision, as follows:

> "Percentage on the income or receipts, by agents of foreign insurance companies, *imposed for the privilege of carrying on their business, is not a tax within a constitutional sense.* Desty, American Law Taxation, p. 229 * * *.
>
> "The state reserves the right to prohibit foreign insurance companies from doing business within the state, and it may regulate, prescribe, and impose any burdens, terms, or conditions it chooses, reasonable or unreasonable, *in giving its assent to such corporation to engage in business within the state. Hebring* v. *Lee, State Ins. Com.* (Ore.), 269 Pac. 236 * * *.
>
> "In the case at bar no lump sum is designated as a license fee or privilege tax for the purpose of transacting business within the state. It seems manifest that a certain per cent of the premiums collected by a foreign insurance company *is an equitable mode of determining what burdens, license fee, or privilege tax should be charged to said corporation for the right or privilege to do business within the state.*"

When the Supreme Court of Oklahoma held in the above case that the payment by a foreign insurance company of said annual fees, *including said annual two per cent premium tax,* was not in lieu of ad valorem taxes on its personal property, and that such a company, like a competing domestic company, must pay ad valorem taxes on its personal property in this State, it was undoubtedly aware that said premium tax (there being no like or equalizing or compensating tax paid by competing domestic insurance companies) *discriminated heavily* against foreign insurance companies. Therefore, unless said court was of the opinion that said annual two per cent premium tax was *a tax or fee for the right or privilege of entering Oklahoma and doing business therein during the year for which same was paid,* it would not have considered or treated said tax as constitutional and valid. It was, therefore, necessary and not merely *dicta* for the court to hold, as it did hold, that said annual two per cent premium was charged

> "for the right or privilege to do business within the state."

The Hanover Fire Insurance Company Case

Inasmuch as the case of *Hanover Fire Insurance Company* v. *Carr, Treasurer (formerly Harding, Treasurer)*, 272 U. S. 494, 71 L. ed. 372, *is the decision upon which petitioner places its chief reliance in its petition for writ of certiorari,* same will be fully discussed by respondents. However, before doing so we desire to call attention to the salient fact, as will

hereinafter be shown, that while said case held that the net receipts tax of Illinois, as construed by the Illinois Supreme Court in 1923, was discriminatory and invalid, it in effect held that the 1919 two per cent annual gross premium tax of Illinois (same being essentially the same as the tax involved here) was a tax paid for the privilege of doing business in said state for the ensuing year, and was hence valid even though discriminatory.

Moreover, petitioner wholly fails to consider in its petition for writ of certiorari and supporting brief, the pertinent fact that while the 1919 act was passed long after the Hanover Fire Insurance Company first entered the State of Illinois, the annual two per cent premium tax levied thereby, even though clearly discriminatory, was treated as valid by this Court as to said company under the theory that same was a tax for the privilege of annually entering said state and doing business therein during the succeeding license year.

In this connection said case reveals that in 1869 the State of Illinois passed a law relating to the domestication of foreign insurance companies in Illinois. Section 30 of said Act, which was immaterially amended in 1879, operated to annually levy the regular ad valorem tax on the net receipts of such companies during the prior year. Section 22 of said 1869 law provided for the admission and regulation of such a company, required local agents thereof to secure annually certificates of authority from the director of trade of said state showing that the company had complied with

the law "which applied to it," and also required the company to pay $30.00 for its charter, $10.00 for its annual statement, and $2.00 for each agent's certificate of authority. The payment of the net receipts tax provided for in Section 30 was in no way a condition precedent for said company to enter the State of Illinois and to do business therein. No similar tax was required of domestic corporations, but both foreign and domestic corporations were required to pay the regular ad valorem tax upon their real and personal property.

The computation of the regular ad valorem tax in Illinois on personal property was in theory upon fifty per cent of the actual value thereof, but as a matter of practice said fifty per cent was debased to thirty per cent, hence personal property in Illinois was actually only taxed on thirty per cent of its actual value. Said net receipts tax, being considered a tax upon personal property, was debased to thirty per cent of said net receipts and said ad valorem tax computed thereon. This procedure was followed from 1869 to 1923, when the Supreme Court of Illinois held that said ad valorem tax should be levied upon the full amount, rather than upon said debased amount, of the net receipts of a foreign insurance company.

Prior to said holding *and in the year 1919*, the Legislature of Illinois passed a law requiring foreign insurance companies to pay an annual state tax for the privilege of doing an insurance business in said state equal to two per

cent of the gross amount of the premiums received therein during the preceding year, but said law did not repeal or supersede said prior net receipts tax law.

It is significant to note that this annual two per cent premium tax, which was levied for a purpose similar to that of the tax involved here, has never been protested by foreign insurance companies doing business in Illinois, and it is specifically stated in the Hanover case that the Hanover Fire Insurance Company had paid said tax.

It was also the contention of the Illinois court in its said 1923 decision that while payment of said annual net receipts tax was not a condition precedent for said company to enter said state, that since its agents were required by Section 22 of the 1869 Act to procure annually from the insurance superintendent a certificate of authority stating that the company had "complied with all the requirements" of said Act, and since payment of said net receipts tax was a part of said requirement, said tax was levied as compensation for the privilege of continuing "to do business in said state," and hence valid, even though discriminatory.

The Hanover Company did not object to the payment of said net receipts tax until the Supreme Court of Illinois held in 1923, as aforesaid, that same should be computed upon the actual amount of its net receipts and not upon the debased value thereof. After this decision said company refused to pay the full amount of said receipts tax and filed action to enjoin the collection of a tax warrant therefor.

This Court held that said tax, as so computed, was discriminatory and invalid, but in effect also held that as long as the same was computed on the debased value of said receipts, as was other personal property, it was not discriminatory or invalid.

In so holding the Court, after citing cases to the effect that a state cannot, as a condition precedent to the admission of a foreign corporation to do business therein, validly require the corporation to surrender rights guaranteed to it by the Federal Constitution, such as a right derived under the Commerce Clause or the right to remove an action brought against it to a Federal Court, had this to say in relation to the validity of state taxes under the Fourteenth Amendment of the Constitution of the United States:

> "In subjecting a law of the state which imposes a charge upon foreign corporations to the test whether such a charge violates the equal protection clause of the Fourteenth Amendment, *a line has to be drawn between the burden imposed by the state for license or privilege to do business in the state and the tax burden which, having secured the right to do business, the foreign corporation must share with all the corporations and other taxpayers of the state.* With respect to the admission fee, so to speak, which the foreign corporation must pay to become a quasi citizen of the state and entitled to equal privileges with citizens of the state, *the measure of the burden is in the discretion of the state* and any inequality as between the foreign corporation and the domestic corporation in that regard does not come within the inhibition of the Fourteenth Amendment; but after its admission, the foreign corporation stands equal and is to be classified with domestic corporations of the same ink * * *.

"What, therefore, we have to decide here is whether the application of section 30 can be one of the conditions upon which the insurance company is admitted to do business in Illinois, or whether under the Law of 1919 the authority granted by the department of trade and commerce for which the company paid two per cent of gross premiums received the previous year by it put it upon a level with domestic insurance companies doing business of the same character.

*"It is plain that compliance with section 30 is not a condition precedent to permission to do business in Illinois. The State Supreme Court concedes this, * * *."*

By the above language this Court in effect held that while said net receipts tax, as construed by the Illinois court in 1923, was an "occupation tax" or a "privilege tax," same was not paid "for the license or privilege to do business in the state," and that the Illinois court conceded compliance with said Section 30, to-wit, payment of said net receipts tax,

"is not a condition precedent to permission to do business in Illinois."

This Court also in effect held that said 1919 two per cent annual gross premium tax, same being analogous to the tax involved here, was a tax for the right or privilege of doing business in Illinois for the ensuing year and hence valid.

This Court also held that while the license construed in the Greene case, hereinafter mentioned, "was indefinite," the license construed in the Hanover case "must be renewed from year to year." This is shown by the following excerpt from said case, to-wit:

"In the Greene case the license was indefinite. In this case it must be renewed from year to year, but the principle is the same that pending the period of business permitted by the state, the state must not enforce against its licensees unconstitutional burdens."

The above quoted language is in harmony with the holding in *Philadelphia Fire Association* v. *New York, supra,* and reveals that the licensing provisions of laws, such as the Illinois law construed in the Hanover case, only permit a foreign insurance company to do business in the licensing state for one year. It was probably for this reason that the 1919 two per cent annual gross premium tax law of Illinois, which, as stated in the Hanover case,

"* * * provided that each non-resident corporation licensed and admitted to do an insurance business in the state should pay an annual state tax for the privilege of so doing, equal to two per centum of the gross amount of premiums received during the preceding calendar year on contracts covering risks within the state after certain reductions; * * *,"

was held or treated as valid by this Court, and that said annual two per cent gross premium tax, both before and since said decision, has been paid without question by foreign insurance companies doing business in Illinois.

The Shaffer Oil & Refining Company Case

The Hanover case was followed in the case of *Sneed, Treasurer* v. *Shaffer Oil and Refining Comanpy et al.* (C. C. A. 8th Cir., 1929), 35 Fed. (2d) 21, *also relied upon by petitioner in its petition for a writ of certiorari,* wherein it

is held that a law of Oklahoma then enforced by the Oklahoma Corporation Commission, levying an annual discriminatory corporation license tax upon foreign corporations which had theretofore received (like the railway company in the Greene case, *supra*), an "indefinite license" to do business in Oklahoma from the Oklahoma Secretary of State, was invalid under the Fourteenth Amendment of the Constitution of the United States. Said case is not in point here *since a foreign insurance company receives no license whatsoever from the Oklahoma Secretary of State* (See *State* v. *Prudential Ins. Co. et al.*, 180 Okla. 191, 68 Pac. [2d] 852), and the only license or permit it receives is a license from the State Insurance Commissioner to do business in Oklahoma *for one license year.*

The action involved here is, in reality, a suit against the State of Oklahoma by a citizen of another state, and hence brought in violation of the 11th Amendment of the Constitution of the United States for the reason that said state has not consented to be sued for the recovery of taxes paid under protest except in its own courts.

The above proposition, which is supported by the first paragraph of the conclusions of law (R. 31) of the trial court herein, should be considered by this Court in determining whether or not it will issue the writ of certiorari prayed for by petitioner. In this connection it will be noted that Section 12665, Oklahoma Stautes, 1931, under the purported

authority of which this action was brought (paragraph 1 of Stipulation of Facts—R. 22), provides in part that all suits to recover taxes paid under protest:

> "shall be brought in the court having jurisdiction thereof, *and they shall have precedence therein;* if, upon final determination of any such suit, the court shall determine that the taxes were illegally collected, as not being due the state, county or subdivision of the county, *the court shall render judgment showing the correct and legal amount of taxes due by such person, and shall issue such order in accordance with the court's findings,* and if such order shows that the taxes so paid are in excess of the legal and correct amount due, the collecting officer shall pay to such person the excess and shall take his receipt therefor."

That an action filed against a state officer to recover taxes paid under protest, as provided in Section 12665, is, in reality, a suit against the state, and that in said section the state waived its sovereign immunity from such a suit *in courts of the State of Oklahoma,* is shown by the case of *Antrim Lumber Company* v. *Sneed, State Treasurer* (Okla. 1935), 175 Okla. 47, 52 Pac. (2d) 1040, wherein the Supreme Court of Oklahoma held in the third paragraph of the syllabus, as follows:

> "In this jurisdiction a suit for the recovery of illegal taxes is deemed to be in effect a suit against the state and consent to the maintenance of such a suit has been granted by section 12665, O. S. 1931, * * *."

In the body of the opinion it is stated:

> "The case of *Atchison, T. & S. F. Ry. Co.* v. *O'Connor, supra* (223 U. S. 280, 56 L. ed. 436), together with *Erskine* v. *Van Arsdale,* 15 Wall. 75, 21 L. ed. 63, and the *Virginia Coupon Cases,* 144 U. S. 270, 5 Sup. Ct. 903, 962, 29 L. ed 185, are authority for the *individual liability* of a

treasurer to repay taxes paid to him involuntarily and under protest when the tax is exacted under an unconditional statute, *but are inapplicable where the suit is against the treasurer in his official capacity and thus is in effect a suit against the state.* As has been said in *Smith* v. *Reeves*, 178 U. S. 436, 20 Sup. Ct. 919, 44 L. ed. 1140:

> "'An action against a state treasurer *in his official capacity*, which is in effect to compel the state, through him, to perform its promise to return to taxpayers money that may be adjudged to have been taken under an illegal assessment, is in substance an action against the state itself, within the meaning of U. S. Const., Eleventh Amend.'"

The above decision of the Supreme Court of Oklahoma, construing the meaning of Section 12665, *supra*, is binding on this Court.

By an examination of said section it will be found that the State of Oklahoma waived its common law immunity from suit, as provided therein, for the recovery of taxes paid under protest. However, in view of the fact that it is a primary rule of statutory construction, as stated in 59 C. J. 1121, that

> "statutes in derogation of sovereignty should be strictly construed in favor of the state, so that its sovereignty may be upheld and not narrowed or destroyed, and should not be permitted to divest the state or its government of any of its prerogatives, rights, or remedies, unless the intention of the Legislature to effect this object is clearly expressed,"

and since in Section 12665 the Legislature expressly provided that suits filed under authority thereof

> "shall have precedence,"

in the courts in which same are filed, and that said courts

"shall render judgment"

in the manner prescribed therein, *which procedural requirements the Oklahoma Legislature had authority to prescribe for actions in state courts, but not in federal courts,* it is not conceivable that when the Legislature enacted said section it intended to authorize the filing of actions to recover protested tax payments in federal courts. In support of our above conclusion attention is called to the principles of law announced in the cases of *Smith* v. *Reeves, supra,* 178 U. S. 436, 40 L. ed. 1140, and *Chandler* v. *Dix,* 194 U. S. 590, 48 L. ed. 1129.

While it is true that Section 12665 has been considered by the Federal courts, such as in decisions of this Court reviewing decisions of the Oklahoma Supreme Court construing said section, or in injunction actions predicated upon the proposition that said section did not afford an adequate remedy at law, we have been unable to find any case going into the question as to whether the State of Oklahoma, by the passage of said section, waived its immunity under the Eleventh Amendment from being sued in the federal courts.

That this action is a suit against the State is further shown by the fact that while the protested payment sued for here is not deposited "in the General Revenue Fund of the State Treasury" (paragraph 1 of Stipulation—R. 22), it is deposited under the provisions of 62 O. S. 1941, sections 74 and 75, in the Insurance Commissioner' Protest Fund or Account *in the State Treasury.* It will thus be noted that

if petitioner recovers judgment herein same must be paid from moneys deposited in the treasury of this State. It was probably for this reason that the Supreme Court of Oklahoma, in construing Section 12665, held in the third paragraph of the syllabus of the Antrim Lumber Company case, as aforesaid, that:

> "In this jurisdiction a suit for the recovery of illegal taxes is deemed to be in effect a suit against the state and consent to the maintenance of such a suit has been granted by section 12665, O. S. 1931, * * *."

In this connection it will be noted that in the body of the opinion of said case the court construed said section as authorizing the filing of an action by a protesting taxpayer against the proper State tax collecting officer,

> "to compel a refund of the alleged illegal tax to be made to it *out of the state treasury*,"

to-wit, out of said officer's protest fund or account in the State Treasury. Such an action is, in effect, a mandamus action. This, coupled with the fact that State courts, but not Federal courts, have jurisdiction in mandamus actions, supports our contention that in Section 12665 the State intended to waive its common law immunity from suit in the courts of the State, but not to waive its immunity under the Eleventh Amendment from being sued in courts of the United States.

Before concluding this proposition of our brief, respondent desires to again call attention to the case of Atchison, Topeka and Santa Fe Railway Company v. O'Connor. By an examination of said case it will be found that same is brought

against O'Connor personally, and not as an officer of the State of Colorado. In this connection it will be noted that in our quotation from the Antrim Lumber Company case the court, in referring to the O'Connor case and to another cited case, held that the same:

> "are authority for the *individual liability* of a treasurer to repay taxes paid to him involuntarily and under protest when the tax is exacted under an unconstitutional statute, *but are inapplicable where the suit is against the treasurer in his official capacity* and thus is in effect a suit against the state."

The matter in controversy does not arise under the Constitution or laws of the United States.

If it be held that while this suit is, in reality, a suit against the State, the State by Section 12665, *supra*, not only waived its common law immunity from suit in its own courts, but its immunity under the Eleventh Amendment from being sued in the federal courts, respondent desires to call attention to the fact that in such case this Court does not have jurisdiction of the subject-matter of this action and hence should not issue the writ of certiorari prayed for by petitioners; this for the reason that while the amount sued for in petitioner's original complaint exceeds $3,000.00, the State is not a citizen within the meaning of the diversity of citizenship provision and the matter in controversy does not arise under the constitution or laws of the United States. This proposition is supported by the second paragraph of the conclusions of law (R. 31) of the trial court herein.

In this connection it will be noted that it is not contended by petitioner that any law of the United States is involved in this case, its sole contention being that the action set forth in its original complaint arises under the Fourteenth Amendment of the Constitution of the United States for the reason that the constitutional and statutory provisions of Oklahoma under which the taxes involved here were collected, *as said provisions are construed by petitioner,* violate that part of said amendment which provides, that no state shall,

> "deny to any person within its jurisdiction the equal protection of the law."

It will also be noted, from an examination of the original complaint (R. 4-11), as well as the answer (R. 12-15) and stipulation (R. 22-26): *that there is no issue in the cause of action set forth in said complaint as to the proper construction of the Fourteenth Amendment, but that the only real or substantial issue involved therein is whether the constitutional and statutory provisions of this State, when properly construed,* require a foreign insurance company to pay the annual premium taxes mentioned therein:

(a) as contended by petitioner, *not for the right or privilege* of entering and doing business therein during the license year for which same are paid, in which event said taxes are admittedly invalid under said amendment; or

(b) as contended by respondent, *for the right or privilege* of entering Oklahoma and doing business therein during the license year for which same are paid, in

which event said taxes are admittedly not invalid under said amendment.

In support of respondent's position as to the jurisdictional issue above presented, attention is called to the general rule set forth in Volume 1 of Hughes' Federal Practice, page 407, sec. 551, where, under the subject "When Case Arises Under the Constitution," it is stated:

> "A case arises under the Constitution of the United States when some title, right, privilege or immunity on which a recovery depends will be defeated by one construction of that constitution, or sustained by an opposite construction, or whenever the correct decision of the case depends upon the correct construction of the constitution, * * *."

In the case of *Cooke* v. *Avery*, 147 U. S. 375, 37 L. ed. 209, this Court held:

> "Whether a suit is one that arises under the constitution or laws of the United States is determined by the questions involved. If from them it appears that some title, right, privilege or immunity on which the recovery depends *will be defeated by one construction of the constitution or a law of the United States, or sustained by the opposite construction*, then the case is one arising under the constitution or laws of the United States. *Osborn* v. *Bank of the United States*, 8 Wheat. 738; *Starin* v. *New York*, 115 U. S. 248, 257. In *Carson* v. *Dunham*, 121 U. S. 421, it was ruled that it was necessary that the construction either of the constitution or some law or treaty should be directly involved in order to give jurisdiction, * * *."

CONCLUSION

In consideration of the argument and authorities presented herein respondent respectfully asks the Court to decline to issue the writ of certiorari prayed for by petitioner.

Respectfully submitted,

MAC Q. WILLIAMSON,
Attorney General of Oklahoma;

FRED HANSEN,
Assistant Attorney General
of Oklahoma;

ANDY CROSBY, JR.,
State Capital Building,
Oklahoma City, Oklahoma,

Attorneys for Respondent.

September, 1943.